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No. 93-1841

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,
v.

FEDERICO PEÑA, SECRETARY OF DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, WOMEN'S LEGAL DEFENSE FUND, NATIONAL WOMEN'S LAW CENTER AND NATIONAL COUNCIL OF LA RAZA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a national civil rights organization formed in 1963 by leaders of the American bar at the request of President Kennedy, to provide legal representation to African-Americans who were being deprived of their civil rights. The Lawyers' Committee and its local affiliates have represented the interests of African-

Americans, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, housing, equalization of municipal services and school desegregation.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has played an active role in the battle for racial justice and has long supported the constitutionality of affirmative action in appropriate circumstances.

The Women's Legal Defense Fund (WLDF), founded in 1971, is a national advocacy organization that works to develop and promote policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 23-year history, WLDF has placed special emphasis on workplace discrimination issues, including sexual harassment, pay equity and affirmative action.

The National Women's Law Center (Center) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has actively sought to remedy sex discrimination and secure the rights of women, and has participated in major Supreme Court cases addressing women's rights.

The National Council of La Raza (NCLR) is a private, nonprofit corporation dedicated to reducing poverty within, and discrimination against, the Hispanic community. NCLR is the largest constituency-based national Hispanic organization, and serves all Hispanic nationality groups in all regions of the country. NCLR represents nearly 200 formal affiliates—local community-based Hispanic organizations—who together serve more than two

million Hispanics annually in 37 states, Puerto Rico and the District of Columbia.[1]

STATEMENT OF FACTS

In 1975, Congress found that pervasive discrimination had formed a barrier against the creation of minority-owned businesses and had decreased the opportunities available to those minority-owned businesses that had managed to overcome that barrier.[2] In response to those findings, Congress established for federal agencies a minimum goal of five percent participation by disadvantaged business enterprises ("DBEs") in federal contracting programs.[3] DBEs are defined by statute as economically and socially disadvantaged enterprises, and minority-owned businesses are presumed (subject to rebuttal) to be such enterprises.[4] Nonminorities may qualify for the DBE designation if they meet the criteria for social and economic disadvantage.

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

[2] Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 468, 94th Cong., 1st Sess. (1975).

[3] The Small Business Act of 1978 (SBA), Pub. L. No. 95-507, 92 Stat. 1770, 15 U.S.C. § 644(g)(2) (1988 & Supp. IV 1992).

[4] 15 U.S.C. § 637(d) (§ 8(d) of the SBA); 15 U.S.C. § 637(a) (§ 8(a) of the SBA); Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 144. It is unclear from the record which statutory framework petitioner is challenging. The courts below appear to have assumed that Gonzales Construction Co., the company that was awarded the guardrail subcontract over petitioner, benefitted from the presumption in favor of minorities in its certification as a DBE, and thus in this brief we assume the same. This brief addresses the presumption contained in STURAA, as STURAA was the source of the funding for the program at issue. Petitioner's Brief at 3-4. The outcome of our analysis would not be affected by selection of either of the other statutory presumptions.

The Federal Lands Highway Program ("FLHP"), an agency within the Department of Transportation, has implemented Congress' DBE mandate through a Subcontracting Compensation Clause ("SCC") that provides prime contractors additional compensation if they use a minimum percentage of DBEs as subcontractors. The SCC program is one component of Congress' overall scheme to promote the economic integration of minorities into the mainstream economy.[5]

At issue here is a contract awarded by Central Federal Lands Highway Division ("CFLHD"), a regional division of FLHP responsible for highway construction on federal lands in several states. CFLHD does not require that contractors bidding on prime contracts include DBEs in their bids, and it awards contracts to the lowest bidder irrespective of DBE participation. However, contracts used by CFLHD contain the SCC, which provides that if the prime contractor voluntarily subcontracts ten percent or more to a DBE, the prime contractor receives additional compensation for locating, training, utilizing, assisting and developing that DBE.[6] The SCC program is intended to increase DBE subcontracting without imposing any mandatory goals or instituting any quotas.

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[5] The FLHP administered $55 million of the total $740 million Congress appropriated annually, from 1987 to 1991, for federal highway construction. STURAA, 101 Stat. 138 § 103(b)(4)(G), 145 § 106(a)(8).

[6] *See Adarand Constructors, Inc. v. Peña, et al.*, 16 F.3d 1537, 1541 (10th Cir.), *cert. granted*, 115 S. Ct. 41 (1994). The SCC provides that the contractor receives 1.5% of the contract amount for using one DBE, and 2% for the use of two or more DBEs.

SUMMARY OF ARGUMENT

At issue in this case is Congress' power to address the effects of past and continuing discrimination that has hampered the participation of minority businesses in the economy. The issue is not a new one. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court upheld a race-conscious program enacted by Congress to remedy the effects of racial and ethnic discrimination. Subsequent decisions of this Court, and of every federal appellate court before which the question has been raised, have confirmed that Congress has the power—beyond that of states and other governing bodies--to address, through such programs, the problems caused by past and continuing discrimination.

These decisions properly recognize the unique power granted to Congress by the Reconstruction Amendments. Thus, they apply to race-conscious programs established by Congress in response to discrimination a standard of review that differs from the strict scrutiny applicable to state and local programs. This standard requires the Court to examine carefully such programs and balance the protections of the Fifth Amendment with deference to Congress' enforcement powers under the Reconstruction Amendments. The workable standard articulated by the *Fullilove* majority can and should be applied to uphold the program here at issue.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY AND CORRECTLY RECOGNIZED THAT THE CONSTITUTION GRANTS CONGRESS UNIQUE AUTHORITY TO ENACT RACE-CONSCIOUS PROGRAMS TO ADDRESS THE EFFECTS OF DISCRIMINATION

The economic integration of members of minority groups who have suffered pervasive discrimination in our society continues to be one of the most important and difficult problems our nation must confront.[7] The fundamental issue raised by petitioner—does Congress have authority to use programs that rely on, among other factors, race or ethnicity, in order to ameliorate the dislocation and exclusion from the economic mainstream caused by racial or ethnic discrimination—has already been addressed and resolved by this Court. In *Fullilove*, and subsequent cases, this Court has consistently recognized that the Enforcement Clauses of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution enable Congress to establish such programs.

A. *Fullilove* and Its Progeny Have Upheld the Authority of Congress to Enact Race-Conscious Programs and Have Distinguished Congress' Power From That of the States

Fullilove v. Klutznick, 448 U.S. 448 (1980), is this Court's seminal decision addressing Congress' authority to promote the economic rights of minorities affected by this nation's legacy of discrimination. The Court there upheld congressional authority to make "limited use of racial and ethnic criteria," *id.* at 473, to respond to the effects of

[7] "The fact is that racism and prejudice are alive and well in America and have caused us to scale higher heights and labor with greater burdens than that of our fellow majority contractors." *Discrimination in Surety Bonding, Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. 6 (1993) (testimony of John B. Cruz III).

past and continuing racial and ethnic discrimination.[8] At issue in *Fullilove* was the Public Works Employment Act of 1977 ("PWEA"), which included a requirement that states accepting federal construction funds allocate at least ten percent of such funds for contracts awarded to businesses owned by minorities. Every member of the Court recognized that Congress had broad and unique powers to combat racial discrimination;[9] a clear majority of the Court thought Congress' power was sufficient to uphold the set-aside program at issue in that case.[10]

Chief Justice Burger distinguished Congress' power from that of state and local governments in sweeping terms: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483.[11] Similarly, Justice Powell pointed out:

[8] In addition to finding that racial criteria were acceptable for remedial purposes, the plurality opinion of Chief Justice Burger, joined by Justices White and Powell, also noted that the use of such criteria, if properly limited, was permissible "to effectuate the constitutional mandate for equality of economic opportunity." *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980). *See also id.* at 463, 490.

[9] *See id.* at 472-73 (opinion of Burger, C.J., joined by White and Powell, JJ.); *id.* at 520 n.4 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ.); *id.* at 526 (opinion of Stewart, J., joined by Rehnquist, J.); *id.* at 548 (opinion of Stevens, J.).

[10] In addition, Justice Stevens, in dissent, distinguished the *Fullilove* program from one, like the program at issue here, in which "[r]ace was used as no more than a factor in identifying the class of the disadvantaged." *Id.* at 535 n.6 (Stevens, J., dissenting).

[11] Chief Justice Burger observed that Congress' authority to enact the program at issue was rooted as well in the Spending and Commerce Clauses. U.S. Const., Art. I, § 8, cl. 1 & 3. Congress may employ the spending power to further these policy objectives, and, where "inequity has an effect on interstate commerce," Con-

> When we first confronted [the] issue [of affirmative action] in *Bakke*, I concluded that the Regents of the University of California were not competent to make . . . findings sufficient to uphold the use of the race-conscious remedy they adopted . . . . *But the issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments.*

Id. at 516 (Powell, J., concurring) (emphasis added).[12]

Nearly a decade after *Fullilove*, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court forcefully reaffirmed the *Fullilove* decision and its rationale.[13] In *Croson*, the Court struck down a minority set-aside plan instituted by the City of Richmond. But in so doing, the Court went to great lengths to distinguish the "unique powers" of Congress from the more circumscribed authority of states and municipalities: "Congress, unlike any State or political subdivision, has a specific constitutional mandate" allowing it to "identify and redress the effects

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gress can, through the Commerce Clause, take "necessary and proper action to remedy the situation." *Fullilove*, 448 U.S. at 475. In addition, when using its spending power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove*, 448 U.S. at 474).

[12] *See also Fullilove*, 448 U.S. at 499 (Powell, J., concurring) ("Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 608-09 (1990) ("*Bakke* [was] a case that did not involve congressional action") (O'Connor, J., dissenting).

[13] *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J. and White, J.); *id.* at 521-22 (opinion of Scalia, J.); *id.* at 557-58 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ.).

of society-wide discrimination." *Croson*, 488 U.S. at 490. *See generally id.* at 486-93. The logic of such a distinction, according to the Court's opinion, could be found in "[t]he Civil War Amendments themselves[, which] worked a dramatic change in the balance between congressional and state power over matters of race." *Id.* at 490.[14] Justice Scalia, concurring, further articulated the rationale for treating congressional action differently: "A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *Id.* at 522 (Scalia, J., concurring). Thus, in *Croson*, this Court again differentiated the broad power of Congress to consider race in enacting programs to ameliorate the effects of past and continuing discrimination from the more limited power of states and other political entities to do so.

The Court embraced this distinction once again in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). *Metro Broadcasting* involved a challenge to policies used by the Federal Communications Commission ("FCC") in awarding radio and television broadcast licenses that relied, in part, on race. The Court upheld the programs, attributing "overriding significance . . . [to the fact] that the FCC's minority ownership policies ha[d] been specifically approved—indeed, mandated—by Congress." *Id.* at 563.[15] The Court expressly noted that

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[14] *See also Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone") (citation omitted); *id.* ("[T]he Civil War Amendments granted 'additional powers to the Federal government.'") (citation omitted).

[15] The principal dissent in *Metro Broadcasting* raised the question whether the federal government could rely on its authority under § 5 of the Fourteenth Amendment to justify actions that did not directly implicate the states. 497 U.S. at 606-07 (O'Connor, J., dissenting). While this Court has never so restricted the Enforcement Clauses of the Reconstruction Amendments, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (noting

"much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Id.* at 565.

Taken together, *Fullilove*, *Croson* and *Metro Broadcasting* firmly establish the Court's view that Congress has

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with approval that "[i]n recent decades state and federal legislation has been enacted to prohibit private racial discrimination in many aspects of our society"); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (noting that "the Enabling Clause of [the Thirteenth] Amendment empowered Congress to . . . 'pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States'" including laws prohibiting private discrimination) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)); *United States v. Guest*, 383 U.S. 745, 762 (1966) ("§ 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights") (Clark, J., concurring), the program at issue here does not raise the concerns articulated by the dissent for at least two reasons.

First, the broadcast licensing policies at issue in *Metro Broadcasting* involved an activity created and exclusively conducted by the federal government for non-remedial purposes. In contrast, the highway construction program challenged here is one that intimately involves the states and does seek to ameliorate the conditions caused by past and continuing acts of discrimination. Indeed, states are directly involved by virtue of their authority to certify DBEs. In addition, highways built by the federal government on federal lands are integrally connected with highways built by the states utilizing federal funds. Since Congress' right to attach conditions to the states' acceptance of such funds has been repeatedly affirmed (*see Fullilove* and cases collected *infra* at note 16), to prohibit Congress from putting similar conditions on money earmarked for highway projects on federal lands would artificially hamstring Congress' ability to pursue the legitimate goal of the integration of all races into the economy.

Second, as in *Fullilove*, the validity of the program challenged here should not be determined solely with reference to Congress' § 5 powers. Rather, in enacting the instant program—as in *Fullilove*—"Congress employed an amalgam of its specifically delegated powers," 448 U.S. at 473, including its power to act directly pursuant to the Spending and Commerce clauses.

the authority—beyond that of other political entities—to make limited use of racial criteria when fashioning programs to redress the effects of discrimination. The clarity of the Court's position on the question of *congressional* authority (as expressed in these cases) is evidenced by the uniformity of subsequent appellate decisions.[16] As Judge Posner explained in one of those cases, *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991): "The joint lesson of [*Fullilove* and *Croson*] is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do." *Id.* at 423-24.[17]

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[16] *See Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 56 (2d Cir. 1992) ("The critical distinction between *Croson* and the [plaintiffs'] complaints regarding the federal program is that *Croson* concerned a non-federal program."); *Ellis v. Skinner*, 961 F.2d 912 (10th Cir.) (upholding congressional highway construction program requiring states to set-aside at least 10% of contracts for disadvantaged business enterprises), *cert. denied*, 113 S. Ct. 374 (1992); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 976-77 (6th Cir. 1991) ("[T]he Supreme Court has carefully distinguished between the limitations on efforts of states and their political subdivisions to employ race-consicous remedies to overcome the effects of past and present discrimination and the broader power of Congress to address such problems on a nationwide basis.").

[17] The lower courts' reliance on the clear path marked by *Fullilove* and *Croson* (and reconfirmed in *Metro Broadcasting*) mirrors the reliance that thousands of established and nascent subcontractors have placed on the continuing opportunities the challenged program provides. *See GAO Report to Congressional Requesters*, "Highway Contracting" (Sept. 1992) ("Since 1988, state agencies have received thousands of new applications for participation in the Disadvantaged Business Enterprise Program for federal highways each year."). As this Court has noted, the classic case for weighing reliance heavily in favor of following an earlier rule occurs in the commercial context. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991).

B. *Fullilove* and Its Progeny Are Properly Grounded in the Reconstruction Amendments

Fullilove and its progeny correctly recognize that race-conscious programs enacted by Congress must be viewed "against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 463. That promise is contained in the Reconstruction Amendments to the Constitution,[18] whose core principle is the protection of the civil, political and economic rights of minority group members affected by past and present discrimination. The Amendments fundamentally altered the roles of the federal government and the states in guaranteeing this protection by giving to Congress new powers to define and enforce these Amendments,[19] while at the same time withdrawing those powers from the states. *See Croson*, 488 U.S. at 490.[20]

The grant of exclusive enforcement power to Congress is contained in the Enforcement Clauses of the Reconstruction Amendments. The Enforcement Clauses did not merely permit Congress to protect the rights granted in the Amendments—they empowered Congress to "identify unlawful discriminatory practices" and to "prescribe remedies" that would "eradicate their continuing effects." *Fullilove*, 448 U.S. at 502 (Powell, J., concurring). Put simply, the Amendments conferred upon Congress "the

[18] U.S. Const. amend. XIII-XV.

[19] "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . . . It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation." *Ex Parte Virginia*, 100 U.S. 339, 345 (1879) (emphasis in original).

[20] *See also Slaughter-House Cases*, 83 U.S. 36, 68 (1873) (The Reconstruction Amendments conferred "additional powers to the Federal government," and imposed "additional restraints upon those of the States.").

authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination." *Id.* at 510.

The framers of the Reconstruction Amendments distrusted the states to protect the rights contained in the Amendments because "racial discrimination against any group finds a more ready expression at the state and local than at the federal level." *Croson*, 488 U.S. at 523 (Scalia, J., concurring). By selecting Congress as the appropriate repository of the power to enforce the Amendments, the framers embraced the Madisonian theory that the national legislature avoids the parochial interests and factionalism that permeate smaller governmental bodies.[21] As Justice O'Connor stated in *Croson*: the framers refused to "cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions." *Id.* at 490.

Race-conscious remedial measures were considered necessary by the very Congress that passed the Fourteenth Amendment. The framers did not intend to nullify race-conscious programs by Congress, and this is evidenced by the enactment of such programs contemporaneously with the passage of the Reconstruction Amendments.[22]

The Freedmen's Bureau Act of 1866,[23] the most visible and comprehensive remedial program during Reconstruction, was debated and approved by the 39th Congress contemporaneously with the passage of the Fourteenth Amendment.[24] Congress sought to "ameliorate the condi-

[21] *See* The Federalist No. 10, at 82-83 (James Madison); The Federalist No. 51, at 322-23 (James Madison) (Clinton Rossiter ed. 1961). *See also Croson*, 488 U.S. at 522-23 (Scalia, J., concurring).

[22] *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985).

[23] Ch. 200, 14 Stat. 173 (1866).

[24] The House passed the Fourteenth Amendment on May 10, 1866; the Senate passed a modified version on June 8; and the

tion of the colored man" through the programs administered by the Freedmen's Bureau.[25] Most of the services provided by the Bureau benefitted only African-Americans,[26] and several of the Act's provisions were specifically race-based. For instance, the Act designated abandoned and confiscated land and buildings and the proceeds therefrom "to the education of the freed people" [27] and confirmed sales of land set aside for "heads of families of the African race." [28]

The 40th Congress similarly recognized the propriety and necessity of race-conscious curative legislation when it enacted the Colored Servicemen's Claim Act,[29] which provided federal assistance to African-American servicemen seeking special bounties and other payments promised for their service during the Civil War. Opponents of the Act complained that it conferred benefits on black veterans without regard to their need, in that the Act made no distinction between educated and uneducated African-Americans,[30] but the views of a majority in Congress,

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House accepted the Senate changes on June 13. The House passed the Freedmen's Bureau Act on May 29, 1866; the Senate adopted a modified version on June 26; and the Conference Report was approved on July 2 and 3. Cong. Globe, 39th Cong., 1st Sess. at 2545, 2878, 3042, 3149, 3413, 3524, 3562 (1866).

[25] Cong. Globe, 39th Cong., 1st Sess. 631 (1866) (remarks of Rep. Moulton). The Freedmen's Bureau was broadly empowered to "enable [freedmen] . . . to become self-supporting citizens" and aid them "in making [their] freedom . . . available to them." Ch. 200, 14 Stat. 174.

[26] *See* Report of the Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. (1865).

[27] Ch. 200, 14 Stat. 174, Sec. 6.

[28] Ch. 200, 14 Stat. 174, Sec. 8.

[29] 15 Stat. 26, Res. 25 (1867).

[30] Cong. Globe, 40th Cong., 1st Sess., 80-81 (1867) (remarks of Sen. Howe).

stressing that *all* African-American soldiers needed protection because they continued to suffer from the effects of past discrimination, prevailed.[31]

In sum, the Reconstruction Amendments provide Congress with comprehensive power to redress the civil, political and economic problems encountered by minorities.

II. THIS COURT SHOULD UPHOLD THE CHALLENGED PROGRAM UNDER THE *FULLILOVE* STANDARD

Although the Reconstruction Amendments transformed Congress' power to employ programs that rely on racial or ethnic distinctions to achieve economic integration, this Court has properly recognized that such power is not boundless. For even though the Amendments granted Congress broad enforcement power, the Fourteenth Amendment's guarantee of Equal Protection, as incorporated in the Fifth Amendment, requires that such programs undergo examination to ensure that they do "not conflict with constitutional guarantees." *Fullilove*, 448 U.S. at 491.

This examination is not, as petitioner suggests, the sort of scrutiny employed by this Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954). *See* Petitioner's Brief at 25. *Bolling*, a companion case to *Brown v. Board of Education*, involved a challenge to the District of Columbia's segregated school system. In imposing racial segregation on schools in the nation's capital, Congress was acting pursuant to its power contained in Article I, Section 7 of the Constitution, to pass legislation for the District. *See Plessy v. Ferguson*, 163 U.S. 537, 545 (1896). There was no claim—nor could there have been—that segregation was intended to advance or protect the civil, political or economic rights or interests of minority group members. This was not action taken by Congress pur-

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[31] *Id.* at 444 (remarks of Rep. Scofield).

suant to the power conferred upon it by the Reconstruction Amendments. Thus, the racial classifications there were invidious and properly "scrutinized with particular care." *Bolling*, 347 U.S. at 499.

That same level of scrutiny is not appropriate here. To the contrary, what the Enforcement Clauses suggest, as the Court recognized in *Fullilove*, is that Congress is entitled to greater latitude and deference when it adopts, as an element of larger economic legislation, curative programs designed to redress the effects of past and continuing discrimination and promote the goals of the Reconstruction Amendments. *Fullilove*, 448 U.S. at 462. While the *Fullilove* standard defies easy labelling,[32] it requires the Court to "inquire whether the *objectives* of the legislation are within the power of Congress" and then decide whether the legislation is an appropriate "*means* for achieving the congressional objectives." *Id.* at 473 (emphasis in original).

A. The Program Reflects the Proper Exercise of Congress' Powers Under the Enforcement Clauses of the Reconstruction Amendments

The program at issue in this case, the SCC program, is a product of the same broad congressional action that the Court considered, and upheld, in *Fullilove*.[33] The SCC program provides compensation to prime contractors who voluntarily elect to subcontract a minimum percentage of their highway construction projects to disad-

[32] Petitioner tries to circumscribe *Fullilove*'s reach as precedent by squeezing the standard articulated by the plurality into the label "strict scrutiny." Petitioner's Brief at 26-27. What petitioner ignores, however, is that regardless of the varying terminologies, the majority found Congress' use of a remedial set-aside program constitutional. Therefore, it is far more productive to glean the fundamental principles applied by the plurality than to try to characterize the standard.

[33] *See* Federal-Aid Highway Act of 1987, S. Rep. No. 4, 100th Cong., 1st Sess. (1987) [hereinafter Highway Act of 1987].

vantaged businesses. The program accepts DBEs certified under several sets of regulations implementing the Small Business Act ("SBA") and the Surface Transportation and Uniform Relocation Assistance Act ("STURAA"). STURAA was modeled on the PWEA, which was at issue in *Fullilove*, and the PWEA, in turn, was modeled on the SBA.[34]

In reviewing the legislative history of the PWEA, Justice Powell declared that "the total contemporary record of congressional action dealing with problems of racial discrimination against minority business enterprises" was relevant in determining whether Congress had sought to remedy the present effects of past discrimination. *Id.* at 503 (Powell, J., concurring).[35] In recognizing the relevance of this broad history, Justice Powell observed that Congress, as the national legislature, may base its actions not only on the immediate record, but also on the "information and expertise that Congress acquires in the consideration and enactment of earlier legislation."[36]

[34] *See* Highway Act of 1987, S. Rep. No. 4 at 11; *Fullilove*, 448 U.S. at 463. Both the SBA and STURAA contain a congressional mandate to increase DBE participation in federal contracting as well as a rebuttable presumption that minority-owned businesses are disadvantaged. 15 U.S.C. 637(d); STURAA, 101 Stat. 144. *See also* 49 C.F.R. Part 23, Subpart D (1994) (implementing STURRA); 13 C.F.R. § 124.603 (1994) (implementing § 8(d)). STURAA defines "socially and economically disadvantaged" by reference to § 8(d) of the SBA.

[35] "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).

[36] *Id.* Petitioner contends that the Court should require Congress to make findings of "evidence of a pattern or practice of discrimination in government contracting." Petitioner's Brief at 35. However, Congress is not required to make adjudicatory findings of actual discrimination before enacting remedial legislation. *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring). "Congress is not an adjudicatory body called upon to resolve specific disputes between

The Court in *Fullilove* carefully reviewed the "abundant" evidence Congress had collected prior to enacting its legislation, and found it sufficiently ample to uphold the MBE provision at issue.[37] Because the MBE provision in *Fullilove* was modeled on existing programs promoting minority-owned businesses under the SBA, *Fullilove*, 448 U.S. at 460, the Court focused its inquiry on the legislative history of the SBA. In the 1978 amendments to the SBA, Congress based its efforts to promote equality of economic opportunity on a lengthy evidentiary record of persistent and widespread discrimination against minority businesses.[38] These amendments were premised on findings

competing adversaries. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding." *Id.* at 502; *see also Croson*, 488 U.S. at 489 (Congress "need not make specific findings of discrimination to engage in race-conscious relief") (opinion of O'Connor, J.). Requiring Congress to make such specific factual findings "would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).

[37] *Id.* at 477-78 (opinion of Burger, C.J.); *id.* at 502-04 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring). Contrary to petitioner's argument, federal agencies do not have to make additional findings of discrimination. In *Fullilove*, this Court did not require additional findings by state or local grantees in upholding the MBE provision at issue in that case. *Id.* at 478 (opinion of Burger, C.J.). *See also S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 764 (11th Cir.), *cert. denied*, 500 U.S. 959 (1991).

[38] *See, e.g., Hearings on H.R. 567, H.R. 4960 and H.R. 2379 Before the House Subcomm. on Minority Enterprise and General Oversight of the Comm. on Small Business*, 95th Cong., 1st Sess. (1977) [hereinafter 1977 Subcommittee Hearings on H.R. 567]; Minority Enterprise and Allied Problems of Small Business, H.R. Rep. 468, 94th Cong., 1st Sess. 2 (1975) ("The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.").

that such legislation was necessary to remedy the effects of discrimination on the ability of minority businesses to keep "pace with the growth of the national minority population."[39] Congress found that "many individuals are socially and economically disadvantaged as a result of being identified as members of certain [minority] groups."[40]

This same legislative history forms part of the "total contemporary record" of the program at issue here. Since the enactment of the program in *Fullilove*, Congress has continued to acquire significant data through oversight and review of its curative programs.[41] Congress has found that discrimination continues to be a barrier to the growth and development of minority businesses.[42] Indeed, with respect to the highway construction industry, precisely the

[39] 1977 Subcommittee Hearings on H.R. 567, *supra* note 38, at 3.

[40] Amending the Small Business Act and Small Business Investment Act of 1958, H.R. Rep. No. 1714, 95th Cong., 2d Sess. 20 (1978).

[41] *See, e.g., City of Richmond v. J. A. Croson: Impact and Response, Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. (1991); Minority Business Development Program Reform Act of 1988, S. Rep. No. 394, 100th Cong., 2d Sess. (1988); *Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program, Hearings Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); 1977 Subcommittee Hearings on H.R. 567, *supra* note 38.

[42] Highway Act of 1987, S. Rep. No. 4 at 11 ("barriers still remain, preventing minorities and women from successfully competing in the industry"); *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act, Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 2 (1985) [hereinafter 1985 Subcommittee Hearings on 8(d)] ("There is overwhelming support in Congress to open the door of opportunity to enterprising men and women whose race, ethnic background, physical handicap, or gender may have placed them in an economically disadvantaged position.").

industry at issue here, Congress has found that minority contractors' "present disadvantaged position in the field of highway construction is . . . a direct result of historical exclusion." [43] After considering extensive testimony and evidence, Congress decided that the DBE provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry." [44] Congress has made precisely the findings found adequate by the Court in *Fullilove,* and to which the Court deferred in that case.[45]

B. The Program Is An Appropriate Means for Achieving Economic Integration of Minority Businesses

The second part of the *Fullilove* inquiry is whether the program at issue is an appropriate means for achieving Congress' objective. *Id.* at 473. When Congress fashions a program that includes consideration of race as one factor among others, such a program must be narrowly-tailored to address Congress' findings of discrimination. *Id.* at 480. However, as the majority in *Fullilove* noted, Congress has broad discretion under the Enforcement Clauses of the Reconstruction Amendments to choose a suitable mechanism for the redress of racial discrimination.[46] Such mechanisms properly may include prospective action designed to eliminate "barriers to minority firm access to public contracting opportunities." *Id.* at 478.

Congress' obligation to construct a narrowly-tailored program requires certain "critical determinations" to guide

[43] 1985 Subcommittee Hearings on 8(d), *supra* note 42, at 25.

[44] Highway Act of 1987, S. Rep. No. 4 at 11.

[45] *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.); *see also id.* at 503 (Powell, J., concurring).

[46] "We are mindful that '[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.'" *Id.* at 480 (opinion of Burger, C.J.) (citation omitted); *id.* at 510 (Powell, J., concurring); *id.* at 520-21 (Marshall, J., concurring).

implementation and administration of the program. *Id.* at 468. The plurality in *Fullilove* characterized those critical determinations as: "the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority group members that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible." *Id.* Congress has made these determinations with regard to the program at issue here.

The challenged program reflects Congress' decisions to initiate a limited and rebuttable consideration of race and ethnicity and to identify the minorities encompassed by the program.[47] In making these decisions, Congress fashioned the rebuttable presumption to be flexible, and thereby neither overinclusive nor underinclusive.[48] Under

[47] STURAA, 101 Stat. 132; 49 C.F.R. Part 23, Subpart D (implementing STURAA); 15 U.S.C. § 637(d); 13 C.F.R. § 124.105-06 (implementing § 8(d) of the SBA).

Congress' selection of varied minority group members to benefit from the presumption is a valid exercise of its enforcement powers under the Reconstruction Amendments. Although Congress initially exercised its enforcement powers primarily for the benefit of African-Americans, the Amendments and their Enforcement Clauses contain a general grant of authority to aid all minorities. This Court has noted that although the Thirteenth, Fourteenth and Fifteenth Amendments were "addressed to the grievances of the negro race, and were designed to remedy them . . . '[w]e do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction . . . [and] that protection will apply, though the party interested may not be of African descent.'" *United States v. Wong Kim Ark*, 169 U.S. 649, 677 (1898) (quoting *Slaughter-House Cases*, 83 U.S. 36, 72 (1872)).

[48] In this respect, the rebuttable presumption that is one feature of this program is comparable to the 1968 program developed by the Small Business Administration which Justice Stevens cited with approval in *Fullilove*. *See Fullilove*, 448 U.S. at 535 n.6 (Stevens, J., dissenting). In the 1968 program, like the program here at issue, "the class of socially or economically disadvantaged persons neither included all persons in the racial class nor excluded

the implementing regulations for STURAA, nonminorities may qualify as DBEs by demonstrating that they have suffered from social and economic disadvantage.[49] In addition, these regulations establish a mechanism to revoke a DBE's certification if it is found no longer to qualify as disadvantaged.[50] Because this mechanism allows the presumption to be rebutted, it functions as a waiver of the presumption in cases where its application would be unreasonable. This procedure, an integral part of the program that Congress has reviewed on a regular basis, is designed to ensure that only disadvantaged minorities will benefit from the presumption.

Congress also specified a minimum level of minority business participation, another factor the plurality cited as critical in *Fullilove*. *Id.* at 468. In the SBA, Congress set a minimum goal for federal agencies of five percent for the use of DBEs in federal procurement, and required federal agencies to seek the "maximum practicable opportunity" for DBE participation in their procurement contracting.[51] Under STURAA, Congress set a minimum goal of ten percent for DBE participation in Department of Transportation procurement contracting.[52] Through the SBA and STURAA, Congress set thresholds to guide

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all non-members of the racial class. Race was used as no more than a factor in identifying the class of the disadvantaged." *Id.*

[49] 49 C.F.R. Part 23, Subpart D, § 23.62 and Appendix A. The regulation lists disabled Vietnam veterans, Appalachian white males and Hasidic Jews as examples of possibly disadvantaged individuals, to be determined on a case-by-case basis. *Id.*

[50] 49 C.F.R. Part 23, Subpart D, § 23.69. Similarly, § 8(d) of the SBA provides a procedure to challenge a DBE's certification. *See* 13 C.F.R. § 124.603-08.

[51] 15 U.S.C. § 644(g)(1).

[52] 101 Stat. 145 § 106(c)(1). In enacting STURAA, Congress stated that "[s]ome states may wish to establish a DBE goal which exceeds the minimum goal set by this section, and they are permitted to do so." Surface Transportation and Uniform Relocation Assistance Act of 1987, H.R. Conf. Rep. 27, 100th Cong., 1st Sess. 148 (1987).

agencies in the implementation of federal contracting programs. At the same time, Congress has allowed agencies to retain flexibility in setting reasonable goals for their individual agencies.[53]

In addition to setting minimum goals for utilization of DBEs, Congress gave federal agencies a specific mandate to use incentives to increase DBE participation in federal contracting:

> Agencies have the authority to include incentive clauses in government contracts to reward significant efforts on the part of the prime contractor to meet and exceed subcontracting goals. According to the information available to the Committee, however, such clauses are used rarely by most agencies, or not at all. This fact is further evidence that attempts to increase subcontracting goals for small and small disadvantaged business participation are feeble at best.[54]

Congress also endorsed incentive measures to increase DBE subcontracting under the § 8(d) program of the SBA.[55] To that end, Congress has stated:

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[53] Agencies are appropriate entities to carry out legislative directives under congressional supervision. Indeed, this Court has recognized that agencies administering a program pursuant to a federal act should be given great deference in their interpretation of that act. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (ellipsis in original)). In such a case, the agency acts as an agent of Congress. *Cf. Milwaukee County Pavers Ass'n*, 922 F.2d at 424 (state administering federal program acting as agent of federal government "is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.").

[54] Capital Ownership Development Reform Act of 1987, H.R. Rep. No. 460, 100th Cong., 1st Sess. 38 (1987).

[55] Congress noted that in 1986, out of $61.9 billion subcontracted out by government prime contractors subject to § 8(d), only 1.6%

> [E]very Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals . . . is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract.[56]

The challenged program was developed by a division of the Department of Transportation in direct response to Congress' mandate for DBE participation under the SBA.[57]

Congress has repeatedly reviewed and approved programs implemented pursuant to its directive in the SBA.[58] Indeed, Congress maintains substantial oversight

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was subcontracted to DBEs. Congress found "that these percentages do not reflect maximum practicable participation nor do they constitute an acceptable level of achievement." H.R. Rep. No. 460 at 37.

[56] 15 U.S.C. § 637(d)(4)(E).

[57] The Department of Transportation establishes annual goals in consultation with the Small Business Administration. 15 U.S.C. § 644(g)(2). The Department apportions part of its goal to the Federal Highway Administration, who then apportions part of its goal to the FLHP. FLHP apportions this goal between its three regional offices; CFLHD, Eastern Federal Lands Highway Division, and Western Federal Lands Highway Division.

Petitioner misunderstands this structure, arguing that because Congress set the level for small disadvantaged business participation at 5%, 15 U.S.C. § 644(g)(1), CFLHD cannot set a goal of 12-15%. Petitioner's Brief at 47 n.41. CFLHD's target of 12-15% represents its efforts to meet its *apportioned* goal of FLHP's overall goal. Moreover, under STURAA, Congress set a minimum goal of 10% for DBE participation in federal highway contracting. In any case, CFLHD's goals are inapplicable to this case. Petitioner challenges only the SCC program, in which agency goals are irrelevant—if no prime contractor sought to take advantage of the SCC program, there would be no consequence.

[58] The SBA requires agencies to be accountable to Congress for programs implemented under the SBA. For instance, the SBA

over the administration of minority and small disadvantaged business assistance programs.[59] The continual communication between Congress and federal agencies acting under the SBA ensures that the administration of this federal program complies with congressional objectives.

CONCLUSION

For the reasons stated herein, the decision of the court of appeals should be affirmed.

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requires the Small Business Administration to report to the Committee on Small Business of the Senate and the Committee on Small Business of the House of Representatives on the extent of achievement by agencies (relative to their established goals) in federal contracting programs. 15 U.S.C. § 644(h). To that end, agencies are required to submit their fiscal year accomplishments annually. Section 8(d)(11) of the SBA also requires each year a report of subcontracting plans approved by federal agencies but disapproved by the Small Business Administration for failure to provide maximum practicable opportunities for DBEs. 15 U.S.C. § 637(d)(11).

[59] *See, e.g., GAO Report to Congressional Committees*, "Highway Contracting" (Aug. 1994); *GAO Report to the Chairman, Committee on Small Business, House of Representatives*, "Small Business" (Sept. 1993); *Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program, Hearings Before the Comm. on Small Business*, 98th Cong., 1st Sess. (1983).

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